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Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT TACOMA

CHRISTOPHER WALKER, Plaintiff, vs. NATIONAL CREDIT SYSTEMS, INC. AND EQUIFAX INFORMATION SERVICES, INC., Defendants.	Case No.: CV-10-1537-BHS DEFENDANT NATIONAL CREDIT SYSTEMS, INC.'S MOTION TO DISMISS NOTE ON THE MOTION CALENDAR: May 14, 2010 [ORAL ARGUMENT NOT REQUESTED]

Pursuant to FRCP 12(b)(6), defendant National Credit Systems, Inc. (National), by and through its attorney, Jeffrey I. Hasson, moves the court to dismiss this case for the reason that Plaintiff has failed to state a claim upon which relief can be granted.

The motion is based on the Plaintiff's Complaint, the Points and Authorities below, the files and records in this matter, and FRCP 12(b)(6) which are fully incorporated by this reference.

POINTS AND AUTHORITIES

1. JURISDICTION

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The court has jurisdiction pursuant to 28 U.S.C. § 1331 as Plaintiff has alleged a claim under the Fair Debt Collection Practices Act, 15 USC § 1692 et seq. (FDCPA) and the Fair Credit Reporting Act, 15 USC § 1681 et seq. (FCRA).

2. LEGAL STANDARD

A motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6) tests the legal sufficiency of the claims in the Plaintiff's Complaint. The review is limited to the Complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. Cassettari v. Nevada County, Cal., 824 F.2d 735, 737 (9th Cir.1987).

"To survive a motion to dismiss, a Complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, ____ (2009).

A plaintiff's factual allegations must raise a right to relief "above the speculative level." *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007); 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004) ("The pleading must contain something more...than...a statement of facts that merely creates a suspicion of a legally cognizable right of action").

It is a plaintiff's obligation to provide the "grounds" of his entitlement to relief which requires more than labels and conclusions. Id.

A Complaint does not suffice "if it offers naked assertions devoid of further factual enhancement." Iqbal, 129 S. Ct. at___. "Where a Complaint pleads facts that are 'merely consistent with a defendant's liability', it 'stops short of the line between possibility and plausibility of entitlement to relief.' It demands more than an unadorned, the defendant unlawfully harmed me accusation." Id.

3. ARGUMENT

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Plaintiff has failed to state claims upon which relief can be granted pursuant to FRCP 12(b)(6).

Plaintiff's allegations do not state claims for relief that are plausible on their face, or establish a right to relief above a speculative level. Ashcroft v. Iqbaul __ U.S. __, 129 S. Ct. 1937, ____ (2009); *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007).

A. FCRA CLAIM

Plaintiff's claim alleges that:

"NCS has willfully and/or maliciously acted and failed to act as follows:

a) Willfully and/or negligently violated the provisions of the FCRA by willfully and/or negligently failing to comport with FCRA section 1681s-2(b). Complaint p. 4, ¶ 22.

Furnishers of credit information are regulated under the FCRA under 15 USC § 1681s-2.

There is no private right of action under 15 USC § 1681s-2(a) by reason of 15 USC § 1681s-2(c)(1). See Nelson v. Chase Manhattan Mortgage, 282 F.3d 1057 (9^{th}.Cir. 2002).

There is a private right of action for violation of 15 USC § 1681s-2(b) which states:

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall -

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly –

(i) modify that item of information;

(ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

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> (2) Deadline
>
> A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i(a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

Therefore, the first element that must be proved for a violation of 15 USC § 1681s-2(b) is that information must have been furnished to a consumer reporting agency ("… information provided by a person to a consumer reporting agency …").

The second element is that the furnisher receive notice of the dispute **from the consumer reporting agency** under 15 USC § 1681i(a)(2)[1]. Without these initial elements, National was not required to investigate a dispute, or report the results of the investigation to a consumer reporting agency.

Plaintiff has no basis for a claim for relief against National under the FCRA.

There is no allegation that NCS was assigned a debt by Madison Apartment Group LLC (Madison). Further, even if it was assigned a debt by Madison prior to May 2008, a payment to Madison would not satisfy the debt as NCS would be the owner by assignment of the debt. Plaintiff would have paid the debt to Madison at plaintiff's own risk. Further, a report prior to May, 2008 would accurately reflect that a debt was owed.

Therefore, since there was no payment to NCS, a dispute that the debt was paid would only have to review if NCS had received payment. However, under the pleadings,

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[1] 15 USC § 1681s-2i(a) (2) Prompt notice of dispute to furnisher of information

(A) In general

Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.

(B) Provision of other information

The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

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an investigation would not reveal a payment to NCS.

Plaintiff's allegations fail to rise to a right of relief above a speculative level. *See* Bell Atl. Corp. V. Twombly, 127 S.Ct. at 1964-65. Plaintiff's allegations include no statement of facts that would provide the grounds for entitlement to relief for his 15 USC 1681s-2(b) claim. Plaintiff merely asserts labels and conclusions that do not rise to the level of "plausibility of entitlement to relief." *See* Iqbaul, *supra*.

Therefore, the complaint allegations as to an FCRA violation under 1681s-2 are insufficient to show either a negligent or willful violation.

B. DEFAMATION CLAIM

Plaintiff's claim alleges that:

> "NCS has willfully and/or maliciously acted and failed to act as follows:
> b) In the entire course of its actions NCS defamed plaintiffs by storing and distributing false information with disregard for its truth or falsity;
> c) Defamed plaintiff by storing and distributing false information with disregard for its truth or falsity; Complaint p. 4, ¶ 22.

> Except as provided in sections 1681n and 1681o of this title, *no consumer may bring any action or proceeding in the nature of* ***defamation****, invasion of privacy, or negligence with respect to the reporting of information against* any consumer reporting agency, any user of information, or *any person who furnishes information to a consumer reporting agency*, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer. 15 USC § 1681h(e).

There is no claim for defamation for storing or distributing false information.

Plaintiff must plead and prove that false information was furnished with malice or willful intent to injure a consumer. Plaintiff has not pleaded this so the defamation claim fails as a matter of law.

Further, the Complaint alleges no facts related to the defamation claim nor does it include any elements of the claim. The inclusion of the claim by reference with no factual support is a "naked assertion devoid of further factual enhancement." *See* Iqbal, *supra*.

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Plaintiff's Complaint fails to state a claim for defamation upon which relief can be granted.

As no defamation claim is pleaded, there are no "grounds" for entitlement to relief. *See* Twombly, *supra*. There is no facial plausibility that would allow the court to draw a "reasonable inference that the defendant is liable for the misconduct alleged," as any alleged misconduct is not specified. *See* Iqbal, *supra*.

Therefore, the complaint obligations as to defamation are insufficient, and must be dismissed as a matter of law.

C. INVASION OF PRIVACY CLAIM

Plaintiff's claim alleges that:

"NCS has willfully and/or maliciously acted and failed to act as follows:
e) Invading the privacy of plaintiff: Complaint p. 4, ¶ 22.

> Except as provided in sections 1681n and 1681o of this title, *no consumer may bring any action or proceeding in the nature of defamation,* ***invasion of privacy****, or negligence with respect to the reporting of information against* any consumer reporting agency, any user of information, or *any person who furnishes information to a consumer reporting agency*, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer. 15 USC § 1681h(e).

There is no claim for invasion of privacy for storing or distributing false information.

Plaintiff must plead and prove that false information was furnished with malice or willful intent to injure a consumer. Plaintiff has not pleaded this so the invasion of privacy claim fails as a matter of law.

Further, the Complaint alleges no facts related to the invasion of privacy claim nor does it include any elements of the claim. The inclusion of the claim by reference with no factual support is a "naked assertion devoid of further factual enhancement." *See* Iqbal, *supra*.

Plaintiff's Complaint fails to state a claim for invasion of privacy upon which relief can be granted.

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As no invasion of privacy claim is pleaded, there are no "grounds" for entitlement to relief. *See* Twombly, *supra*. There is no facial plausibility that would allow the court to draw a "reasonable inference that the defendant is liable for the misconduct alleged," as any alleged misconduct is not specified. *See* Iqbal, *supra*.

Therefore, the complaint obligations as to invasion of privacy are insufficient, and must be dismissed as a matter of law.

D. FDCPA CLAIM

Plaintiff's claim alleges that:

"NCS has willfully and/or maliciously acted and failed to act as follows:

d) Committed unfair, deceptive and harassing acts and omissions against plaintiff in violation of the FDCPA: Complaint p. 4, ¶ 22.

Plaintiff fails to allege an unfair, deceptive or harassing act or omission committed by NCS.

Further, the Complaint alleges no facts related to the FDCPA claim nor does it include any elements of the claim. The inclusion of the claim by reference with no factual support is a "naked assertion devoid of further factual enhancement." *See* Iqbal, *supra*.

Plaintiff's Complaint fails to state a claim for an FDCPA violation upon which relief can be granted.

As no FDCPA claim is pleaded, there are no "grounds" for entitlement to relief. *See* Twombly, *supra*. There is no facial plausibility that would allow the court to draw a "reasonable inference that the defendant is liable for the misconduct alleged," as any alleged misconduct is not specified. *See* Iqbal, *supra*.

Therefore, the complaint obligations as to a claim under the FDCPA are insufficient, and must be dismissed as a matter of law.

E. FORESEEABLE INJURY CLAIM

Plaintiff's claim alleges that:

"NCS has willfully and/or maliciously acted and failed to act as follows:

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f) Failed in its duty to prevent foreseeable injury to plaintiff: Complaint p. 4, ¶ 22.

There is not cause of action for foreseeable injury. If the cause of action is for negligence, the claim is preempted by 15 USC § 1681h(e) as has been argued above.

Further, the Complaint alleges no facts related to the foreseeable injury claim nor does it include any elements of the claim. The inclusion of the claim by reference with no factual support is a "naked assertion devoid of further factual enhancement." *See* Iqbal, *supra*.

Plaintiff's Complaint fails to state a claim for foreseeable injury upon which relief can be granted.

As no foreseeable injury claim is pleaded, there are no "grounds" for entitlement to relief. *See* Twombly, *supra*. There is no facial plausibility that would allow the court to draw a "reasonable inference that the defendant is liable for the misconduct alleged," as any alleged misconduct is not specified. *See* Iqbal, *supra*.

Therefore, the complaint obligations as to foreseeable injury are insufficient, and must be dismissed as a matter of law.

F. CONCLUSION

Plaintiff's Complaint is the perfect example of what Iqbal calls "an unadorned the defendant unlawfully harmed me accusation." 129 S. Ct. 1937 at ____. All of Plaintiff's alleged claims lack grounds for entitlement to relief and do not rise above the speculative level. *See* Twombly, *supra*.

The potential claims are unaccompanied by any factual content, and certainly not factual content "that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *See* Iqbal, *supra*. Plaintiff's Complaint offers only "naked assertions" and pleads facts that do not rise to the *unacceptable* standard of being "merely consistent with...liability." Id., emphasis added.

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Therefore, Plaintiff fails to meet the legal sufficiency required to state a claim. Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted. FRCP 12(b)(6).

Dated: April 20, 2010.

s/ Jeffrey I. Hasson
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